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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

WINSTON J. PERRON,

Petitioner

v.

GULF OIL CORPORATION,

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether summary judgment is appropriate for the determination of "borrowed servant" status when several factual disputes exist (i.e., Ruiz factors) such that reasonable minds could differ.

2. Does the Longshore and Harbor Worker's Compensation Act, Sections 904(a) and 905(a), as amended in 1984, preclude a worker from being a "borrowed employee" of a general contractor when such contractor is not liable for compensation benefits?

PARTIES BELOW

The parties in the court below were Winston J. Perron, appellant below and petitioner herein; United States Fire Insurance Company, appellant below; and Gulf Oil Corporation, appellee below and respondent here.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Winston J. Perron, the petitioner herein, prays for a writ of certiorari to be issued to review the judgment of the United States Court of Appeals for the

Fifth Circuit entered in the above entitled case on December 26, 1989.

OPINIONS AND JUDGMENTS BELOW

The December 26, 1989, opinion of the United States Court of Appeals for the Fifth Circuit, whose judgment is sought to be reviewed, is unreported [893 F.2d 344 (5th Cir. 1989)], but is printed in the separate Appendix to this Petition, pp. A-17 - A-23, which affirmed the district court's granting of summary judgment to Gulf Oil Corporation after finding insufficient genuine factual dispute to preclude summary judgment. The prior judgment of the United States District Court for the Western District of Louisiana is also unreported and is printed in the separate Appendix to this Petition, pp. A-1 - A-16, which granted summary judgment to Gulf Oil Corporation after finding a borrowed servant

relationship. The February 5, 1990, denial of a timely Petition for Rehearing and Petition for Rehearing En Banc is unreported, but printed in the separate Appendix to this Petition, p. A-24.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit (Appendix A, infra, page A-17) was entered on December 26, 1989. A timely petition for rehearing and petition for rehearing en banc was denied on February 5, 1990 (Appendix A, infra, page A-24). The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. 2101(c).

STATUTES INVOLVED

United States Code

33 U.S.C. 904(a)

33 U.S.C. 905(a)

STATEMENT OF THE CASE

This is a tort action suit against Gulf Oil Corporation ("Gulf") under the Outer Continental Shelf Lands Act, 43 U.S.C. 1333, et seq. Gulf filed a motion for summary judgment alleging that Winston J. Perron ("petitioner" or "Perron") was a "borrowed servant" of Gulf and thus petitioner's exclusive remedy against Gulf lies under the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. 901, et seq., and his tort action should be dismissed. Petitioner filed his memorandum in opposition to Gulf's motion for summary judgment alleging that sufficient determinative factual ingredients were in dispute to preclude a summary judgment on the issue of "borrowed servant."

In May of 1980, Danos & Curole Marine Contractors, Inc. ("Danos & Curole") entered into a written contract with Gulf "to furnish general oilfield labor, equipment, and boats, inshore and offshore, and such other work as is generally performed by you [Danos & Curole] in your usual line of service."

In 1983, Perron was hired by Danos & Curole to work as an operator. Perron was a licensed operator by U.S.M.M.S. and had attended numerous operator training courses prior to the time he was hired by Danos & Curole. Subsequently, Danos & Curole assigned Perron to work at Gulf's production platform in Block 238 of Eugene Island Field as a pumper/lease operator.

Perron very seldom worked on a platform with Gulf personnel. Approximately ninety-five (95%) percent

of the time that Perron worked in the Gulf field, he worked the night shift on Gulf's "I" platform. During this time, there were no Gulf employees assigned to, nor worked, on the platform. Perron was in charge of the operations of the platform while working the night shift and had a Danos & Curole helper. As an experienced operator, Perron knew what work was to get done, when and where to do it. Perron's major responsibility was to make sure that the well continued to produce. The details of the work on a particular platform are left up to the pumper/gauger. Perron had a Danos & Curole helper and was the "man in charge" at the time of the accident. There were no Gulf employees on board the rig at the time of the accident.

Perron's employment with Danos & Curole required him to attend and

sometimes conduct safety meetings while working on Gulf's platform. These meetings were attended only by Danos & Curole employees. A Danos & Curole safety form was filled out at these safety meetings. Perron was warned by Danos & Curole personnel that they would not receive their checks unless a safety meeting report was turned in. A majority of the time, Perron turned in these safety meeting reports and also Danos & Curole time sheets to the Danos & Curole office after returning from his shift offshore. Perron nor any other Danos & Curole employees were not required to attend Gulf's safety meetings. Furthermore, Perron had to consult Danos & Curole concerning vacation time and other time off. Perron did not have to consult Gulf regarding such a request.

On March 3, 1985, while Perron (the "man in charge" with a Danos & Curole worker as a helper) was performing his duties for his employer, Danos & Curole, on Gulf's platform "A", he stepped on a foreign substance which had accumulated on the deck of the platform near the compressor station causing him to fall on his shoulder and back resulting in serious injuries. At the time of the accident, Perron was wearing steel toe boots which Danos & Curole required him to purchase when he was hired. Perron was also wearing a Danos & Curole issued uniform with his employer's logo on the back and a hard hat furnished by his employer, Danos & Curole.

Danos & Curole paid Perron his wages and provided medical, hospitalization, and other insurance to him. Perron also has

received various pay raises from his employer, Danos & Curole.

Gulf provided no compensation to Perron, Gulf made to provisions for pension, profit sharing or retirement for Perron and did not consider Perron its employee--whether borrowed or otherwise--until Gulf's attorney brought the Motion for Summary Judgment.

Perron is currently receiving Longshore and Harbor Workers' compensation benefits provided by insurance purchased by his employer, Danos & Curole, pursuant to its contract with Gulf.

The district court ruled in favor of Gulf on its Motion for Summary Judgment stating that "the bulk of the evidence overwhelmingly indicates plaintiff's [Perron's] borrowed status. . . .In summary, we have adduced insufficient

facts or factual dispute to negate a borrowed employee relationship in this matter."

The United States Court of Appeals for the Fifth Circuit affirmed the district court's ruling and further stated, "Independently applying these [Ruiz, infra] factors, we find insufficient genuine factual dispute on any material issue sufficient to preclude summary judgment. The summary judgment evidence clearly establishes that Gulf controlled the nature and scope of Perron's responsibilities and the conditions under which he worked."

REASONS FOR GRANTING THE WRIT

I. WHETHER SUMMARY JUDGMENT IS APPROPRIATE FOR THE DETERMINATION OF "BORROWED SERVANT" STATUS WHEN SEVERAL FACTUAL DISPUTES EXIST (I.E., RUIZ FACTORS) SUCH THAT REASONABLE MINDS COULD DIFFER.

The threshold issue presented in this case is the question of Perron's status as a "borrowed servant" of Gulf for his recovery from Gulf. If Perron is found to be the "borrowed servant" of Gulf, he is covered by the Longshore and Harbor Workers' Compensation Act, entitling him to workmen's compensation under this Act. Worker's compensation under the LHWCA is the exclusive remedy for an employee against his employer because the Act bars all common law tort actions against the employer, and Gulf is the employer if Perron is Gulf's "borrowed servant." Alday v. Patterson Truck Lines, Inc., 750 F.2d 375 (5th cir. 1985); Hebron v. Union Oil Co. of California, 634 F.2d 245, 248 (5th Cir. 1981); Gaudet v. Exxon Corp., 502 F.2d 351, 356 (5th Cir. 1977), cert. denied,

436 U.S. 913, 98 S.Ct. 2253, 56 L.Ed.2d 414 (1978).

"The borrowed servant doctrine is the functional rule that places the risk of a worker's injury on his actual rather than his nominal employer. It permits the injured worker to recover from the company that was actually directing his work. It may also determine which of the possible employers ultimately bears the cost of the injury." Hall v. Diamond M Co., 732 F.2d 1246, 1249 (5th Cir. 1984), quoting Baker v. Raymond International, Inc., 656 F.2d 173, 178 (5th Cir. 1981).

Beginning with Ruiz v. Shell Oil Co., 413 F.2d 310 (5th Cir. 1969), the Fifth Circuit suggested nine factors to determine whether the "borrowed servant" doctrine applies:

> "(1) Who has control over the employee and the work he is performing, beyond mere

suggestion of details or cooperation?

(2) Whose work is being performed?

(3) Was there an agreement, understanding, or meeting of the minds between the original and the borrowing employer?

(4) Did the employee acquiesce in the new work situation?

(5) Did the original employer terminate his relationship with the employee?

(6) Who furnished tools and place for performance?

(7) Was the new employment over a considerable length of time?

(8) Who had the right to discharge the employee?

(9) Who had the obligation to pay the employee?

See also Capps v. N. L. Baroid-NL Industries, Inc., 784 F.2d 615, 616-617 (5th Cir. 1986), cert. denied, 479 U.S. 838, 107 S.Ct. 141, 93 L.Ed.2d 83 (1986); West v. Kerr-McGee Corp., 765 F.2d 526,

530 (5th Cir. 1985); Alday, 750 F.2d at 376; Gaudet, 562 F.2d at 355.

In Alday, 750 F.2d at 377, the Fifth Circuit reiterated the standard for determining whether summary judgment is appropriate in a "borrowed servant" issue:

> "On the other hand, summary judgment on this issue may be appropriate where "sufficient 'determinative factual ingredients,' i.e., Ruiz factors, [are] undisputed," since "'the issue of whether a relationship of borrowed servant existed is a matter of law.'" Gaudet, 562 F.2d at 357-358.

It is clear from the established jurisprudence in the Fifth Circuit that if sufficient determinative factual ingredients, Ruiz factors, are in dispute, summary judgment is not appropriate on the issue of "borrowed servant" and that the case should proceed to a trial on the merits.

A grant of summary judgment is appropriate only where it appears from the pleadings, depositions, admissions, answers to interrogatories, and affidavits--considered in the light most favorable to the opposing party that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" Williams v. Shell Oil Co., 677 F.2d 506, 509 (5th Cir. 1982), cert. denied, 459 U.S. 1087, 103 S.Ct. 570, 74 L.Ed.2d 933 (1982), quoting Fed.R.Civ.P. 56(c). Any doubt as to the issue of the existence of a material fact is to be resolved against the moving party. Id.; Murphy v. Georgia Pacific Corp., 628 F.2d 862, 866 (5th Cir. 1980).

In affirming the district court's ruling that Gulf is entitled to summary judgment on the issue of whether Perron

was Gulf's "borrowed servant," the Court of Appeals contradicts the decision of West, 765 F.2d at 531, which stated that "enough conflicting evidence has been surfaced to make summary judgment for the defense inappropriate."

Relying on the "control" factor as set out in Ruiz, the Court of Appeals found in the instant case:

> "Insufficient genuine factual dispute on any material issue sufficient to preclude summary judgment. The summary judgment evidence clearly establishes that Gulf controlled the nature and scope of Perron's responsibilities and the conditions under which he worked." (Emphasis ours.)(Appendix A-23).

"This factor, the question of who has control over the employee and the work he is performing, has been considered the central issue of determining 'borrowed employee' status in some of our cases . . .although not necessarily

determinative." Melancon v. Amoco Production Co., 834 F.2d 1238, 1244-1245 (5th Cir. 1988), amended on rehearing, 841 F.2d 572 (5th Cir. 1988). In regards to the element of control, the Court of Appeals in West, 765 F.2d at 531, stated in pertinent part:

> "As we recognized in Alday, however, neither control nor any other single answer to the inquiries 'is decisive, and no fixed test is used to determine the existence of a borrowed-servant relationship.' 750 F.2d at 376, quoting Ruiz, 413 F.2d at 312."

In examining the facts that the petitioner contends are in dispute, one must logically look at the so-called "control" issue. First, Perron was the highest person of authority on this production platform; there were no Gulf employees on the rig; Perron replaced a Gulf counterpart (the Gulf man had a Bell maintenance employee as his helper);

Perron had a Danos & Curole employee as his helper. Perron had no "say-so" in the immediate conditions of the rig when the Gulf man and the Bell Maintenance employee left the rig--so he could not have acquiesced in the rig conditions. Moreover, Perron was a skilled, trained, experienced individual who neither needed nor required nor received supervision from Gulf and certainly had no one controlling the nature and scope of his responsibilities. Perron stipulates Gulf could direct him to whatever platform Gulf wanted him to work on; but this is not sufficient for the legal status of "borrowed servant." Every independent contractor is directed to do the work of the owner. That "directive" of the owner and the owner's work does not make an independent contractor and his employees the borrowed servant of the owner. That

is not the law. (Emphasis supplied.) It appears that the Fifth Circuit thought there were sufficient undisputed facts to hold that Gulf controlled the work and the conditions under which Perron worked. This is not the situation here, unless "ownership" is equated with "control" for determination of borrowed servant status.

Petitioner's counsel suggests that in a "borrowed servant" case, the central issue should be: "Whether the alleged servant is under the actual hour-by-hour, step-by-step control of the borrowing employer's personnel" and also a determination as to whether the petitioner is a trained-skilled employee or does he need or require supervision. Using this inquiry, Perron is not a borrowed servant of Gulf because he neither required nor received supervision by Gulf and he was not under the control

or directions of Gulf on a day-to-day basis and certainly not on an hour-by-hour basis.

Moreover, there is the dispute over what affirmative action did Gulf present that Gulf had acquiesced in Perron as a borrowed employee. Gulf did not provide immediate supervision over Perron; had no Gulf personnel on the rig; gave no day-to-day orders to Perron; gave Perron no Gulf hard hat or uniform; Perron wore no Gulf logos; Perron was not on Gulf's payroll; was not eligible for Gulf's pension and profit-sharing plan; was not considered for Gulf's retirement program; was not paid compensation by Gulf or Gulf's insurer; and it was specifically claimed in the contract between Gulf and Danos & Curole that Danos & Curole employees were independent contractors--

Gulf only being interested in the "end results."

Apparently the only "control" exercised by Gulf was that Gulf could send Perron and Perron's helper to whatever rig Gulf needed experienced and skilled hands. This so-called "control" is not sufficient for "borrowed servant status" under the existing law.

It is apparent from the facts listed above that there remains a genuine dispute over who had control over Perron and the work he was performing. The district court, as well as the Court of Appeals, ignored the fact that each case must be decided on a case-by-case basis according to the conditions and circumstances surrounding each case as set forth in Gaudet, 562 F.2d at 357, which stated:

> "Thus in the instant case the question is whether the

> circumstances of appellants' employment are such that Exxon should be considered an employer and not a third party under the LHWCA. As this is a matter of line-drawing guided by policy, the facts of each case must control the result." (Emphasis ours.)

It is clear from the language used in Gaudet that the principal focus one should use in applying the Ruiz test is not a steadfast rule, but one that should be applied on a case-by-case basis.

Gulf did not provide instructions to Perron on a day-to-day basis, did not have Gulf personnel in the rig when the accident occurred; did not inform Perron of the rig's condition at the changing of shifts, did not advise Perron that the Gulf man's helper, a Bell Maintenance employee, did not clean an area that Perron was to go into, did not require Perron to wear any Gulf uniform or logo,

did not provide a pension or profit sharing plan nor retirement benefits to Perron. Gulf, under its contract, was interested only in the results and specifically stated that Danos & Curole was an independent contractor. The contract is the law between the parties, but the lower courts have ignored the contract.

From the evidence in the record, it cannot be said at this time that there are sufficient determinative factors that are undisputed so as to warrant a summary judgment. Petitioner's counsel does not believe the trial court nor the Court of Appeals meant to equate ownership of the production platform with "control" for purposes of determining "borrowed servant" status. However, the net effect of the instant case is to find that Gulf's ownership of the rig is equated to

"control in determining Perron to be a "borrowed servant." Thus, the district court erred in granting the Motion for Summary Judgment and the Court of Appeals erred in affirming the district court's ruling on the issue of "borrowed servant."

The purpose of this petition for a writ is to point out that under the facts presented, Gulf did not control the rig (the conditions under which Perron worked) nor was there clear and convincing facts that Gulf controlled the nature and scope of Perron's responsibilities (other than from the standpoint of "results"), unless the Court equates ownership of the rig with control for determination of borrowed servant status. The facts in this case present sufficient conflict to deny the defendant's summary judgment.

Petitioner's counsel recognizes that the Court considers the issue of "borrowed servant" a question of law, however, sufficient genuine issues of fact exist that a determination of "borrowed servant status" is not appropriate and this matter should be reversed and remanded for full trial on the merits.

II. DOES THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT, SECTIONS 904(a) AND 905(a), AS AMENDED IN 1984, PRECLUDE A WORKER FROM BEING A "BORROWED EMPLOYEE" OF A GENERAL CONTRACTOR WHEN SUCH CONTRACTOR IS NOT LIABLE FOR COMPENSATION BENEFITS?

Petitioner points out that Congress has amended Sections 904 and 905 of the Longshore and Harbor Worker's Compensation Act by adding amendments in response to the decision of Washington Metropolitan Area Transit Authority v. Johnson, 467 U.S. 925, 104 S.Ct. 2827, 81 L.Ed.2d 768 (1984). Congress amended these sections of the LHWCA in order to overrule this decision by

rewriting Section 904(a) to read in pertinent part:

> "In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor." (Emphasis ours.)

The following sentence was added to the end of Section 905(a):

> "For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title." (Emphasis ours.)

This language of these amendments are "interpreted as foreclosing any designation of any contractor as the employer of its subcontractors'

employees. . .unless the subcontractor failed to secure compensation payments." West, 765 F.2d at 529. These amendments to Sections 904(a) and 905(a) only allow a general contractor to qualify for the grant of immunity if he was obligated to secure compensation benefits and did in fact provide such benefits. The amendment to Section 905(a) confers upon the general contractor the status of employer upon the default of the subcontractor to obtain LHWCA benefits, and if the general contractor has secured such benefits, he will be granted immunity.

The amendment to Section 904(a) provides that a "contractor," such as Gulf, who employs a "subcontractor," such as Danos & Curole, is liable for compensation "only if such subcontractor fails to secure the payment of

compensation." Together with the amendment to Section 905(a), Gulf could have become Perron's employer, responsible for compensation and shielded from tort liability, only if Perron's nominal employer, Danos & Curole, had failed (as it did not) to secure compensation.

Allowing third-party tort actions against general contractors who have provided no direct compensation to an injured employee is consistent with the concept of "quid pro quo." This concept, which forms the basis of workers' compensation statutes, involves the employee giving up the right to sue his employer in exchange for a guaranteed fixed amount of pay for work related injuries regardless of fault. The employer in turn agrees to provide a set compensation with the understanding that

the payments will be the employee's exclusive remedy against the employer.

Since the subcontractor, Danos & Curole did secure the payment of the Act's benefits to its injured employees, the contractor Gulf, the present defendant, is not liable for compensation benefits. Under the unambiguous terms of Section 905(a), Gulf is not entitled to the immunity from tort liability granted only where the Act grants a compensation remedy against an "employer." The Congressional intent is made explicit by the concluding section of Section 905(a), as amended in 1984: "For purposes of this section, a contractor (Gulf) shall be deemed the employer of a subcontractor's (Danos & Curole) employees only if the subcontractor fails to secure the payment of compensation as

required by Section 904 of this title." (Emphasis ours.)

As Judge Tate stated in his concurring opinion in West, 765 F.2d at 533:

> "It makes no functional sense to hold that a contractor, immune under the Act from compensation remedy for injuries received by a subcontractor's employees, is nevertheless also entitled to tort immunity because of the exclusive nature of the compensation remedy accorded, not at all against the contractor, but solely against the subcontractor."

See also Doucet v. Gulf Oil Corporation, 783 F.2d 518, 522 (5th Cir. 1986).

The statutory language is explicit and free from ambiguity. "The starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intent to the contrary, the language must ordinarily be regarded as conclusive."

West, 765 F.2d at 533; citing Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980). "Where, as here, a resolution of a question of federal law turns on a statute, we look first to the statutory language, and then to the legislative history if the statutory language is unclear." Id.; citing Blum v. Stenson, 465 U.S. 886, 896, 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891 (1984). (Emphasis ours.)

The comments to the House Conference Report leave no doubt as to the intent behind the amendments:

> "The Conference substitute, in disapproving WMATA v. Johnson, achieves the following: First, the obligation of the contractor to secure compensation for the employee of the subcontractor is a contingent one, which is triggered only upon the failure of the subcontractor to secure compensation for its own

> employees. Second, the contractor remains amendable [sic] to suit by its subcontractors' employees in those instances where the subcontractor-employer has fulfilled its statutory obligation to secure compensation for its employees. Third, however, where the subcontractor defaults in securing compensation, thus triggering the contractor's obligation, and the latter fulfills that obligation, the contractor is deemed an 'employer' for purposes of section 5(a) and therefore entitled to immunity from suit by the subcontractor's employees. Fourth, if the contractor utilizes a 'wrap-up' insurance policy to provide insurance coverage for the benefit for satisfying the subcontractor's primary obligation to secure compensation, the contractor still remains amenable to suit by employees of the subcontractor; the contractor does not enjoy the immunity afforded by Section 5(a) of the Act."

See H.R.Conf.Rep. No. 98-1027, 98th Cong., 2d Sess. 24, reprinted in 1984 U.S. Code Cong. & Admin. News 2734, 2774.

The amendments to section 905(a) confer upon the general contractor the status of employer upon the default of the subcontractor to obtain LHWCA benefits, and if the general contractor has secured such benefits, he will be granted immunity. As can be seen in the comments to the House Conference Report set out above, the third intended purpose behind the amendments was to grant immunity to a general contractor in this limited situation.

Nothing in the legislative history nor the statutory scheme as a whole indicates any intent or rational reason why a contractor, immune under the Act for compensation remedy, should be accorded tort immunity also (based on the exclusive nature of the compensation remedy, when granted) as to the tortiously injured employee of a

subcontractor (who, under the Act, is liable exclusively for the compensation remedy). West, 765 F.2d at 533.

Under the present facts, Gulf (the contractor) was not statutorily liable to Perron for compensation benefits under the Act, for Perron's payroll employer, Danos & Curole (Gulf's subcontractor), had secured payment of the Act's compensation benefits to its employees injured at work on the Gulf premises. Likewise, not being an "employer" liable for compensation benefits under the Act, Gulf is unambiguously not accorded by the Act any immunity from a tort suit, in this immunity being essentially grounded on the exclusive nature of the Act's compensation remedy when accorded against an "employer" liable for such compensation benefits.

CONCLUSION

This Honorable Court should grant a writ of certiorari in order to create uniformity and predictability in deciding as a question of law, that one is or is not a "borrowed servant" of another and also reinstate the general principle of law as enunciated in Ruiz, which provides at page 321:

> "No one of these factors, or any combination of them, is decisive, and no fixed test is used to determine the existence of a borrowed servant relationship."

There are genuine issues of material facts that reasonable minds could reach different inferences and thus this case is not ripe for summary judgment. There are sufficient Ruiz factors that are in dispute over the control of the rig (e.g., what constitutes control - does mere ownership constitute control?) and

over whether Gulf controlled the nature and scope of the petitioner's work sufficient to preclude summary judgment.

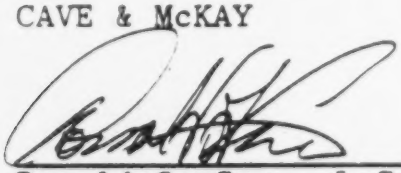
Moreover, this Court should grant a writ in order to decide the important question of federal law which has not been, but should be settled by this Court, of the granting of tort immunity to employers. The 1984 amendments to Sections 904(a) and 905(a) make it clear that the general contractor cannot be considered the employer of a subcontractor's employee when the subcontractor has fulfilled its statutory obligation under Section 904. Even though some confusion still exists as to what a general contractor must do in the every day operations of his business to qualify for Section 905 immunity, it is better to provide an injured worker an opportunity for recovery of his injuries,

which in many cases will remain with him for life than to afford industry a method of reducing operating costs. In this case Gulf has no liability for workmen's compensation and has no liability for damages in tort. This is not right and constitutes serious injustice that requires a remedy.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted:

CAVE & McKAY



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May 3, 1990.

CERTIFICATE

I hereby certify that a copy of the above and foregoing has been served upon all counsel of record by placing a copy of same in the United States mails, postage prepaid and properly addressed to:

John E. McElligott, Jr., Esquire
DAVIDSON, MEAUX, SONNIER & McELLIGOTT
Post Office Box 2908
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James R. Holmes, Esquire
CARMOUCHE, GRAY & HOFFMAN
Twenty-first Floor, Poydras Center
650 Poydras Street
New Orleans, LA 70130-6121

Baton Rouge, Louisiana, this 3 day of May, 1990.

Donald G. Cave

APPENDIX A

OPINION OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF LOUISIANA

(CAPTION DELETED)

R U L I N G

Before us is defendant Gulf Oil Corporation's Motion for Summary Judgment.

While on the payroll of Danos & Curole Marine Contractors, Inc. as a licensed operator, but while working on a production platform owned and operated by defendant Gulf Oil Corporation and located on the Outer Continental Shelf off the Louisiana coast, plaintiff sustained personal injuries during the course of his work.

Gulf had contracted Danos & Curole "to furnish general oilfield labor, equipment, and boats, inshore and offshore . . . ." Contract dated May 15, 1980, Plaintiff's Exhibit A. Gulf

contends that Gulf is Mr. Perron's borrowed employer and that, therefore, Mr. Perron's exclusive remedy lies under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(a). We agree and grant defendant's Motion for Summary Judgment.

Whether a relationship of borrowed employee exists is a matter of law. Ruiz v. Shell Oil Co., 413 F.2d 310, 314 (5th Cir. 1969). The Ruiz court set forth nine factors to focalize the inquiry when determining borrowed employee status:

1. Who has control over the employee and the work he is performing, beyond mere suggestion of details or cooperation?

2. Whose work is being performed?

3. Was there an agreement, understanding, or meeting of the minds between the original and borrowing employer?

4. Did the employee acquiesce in the new work situation?

5. Did the original employer terminate his relationship with the employee?

6. Who furnished tools and place for performance?

7. Was the new employment over a considerable length of time?

8. Who had the right to discharge the employee?

9. Who had the obligation to pay the employee?

Ruiz, supra at 312-13. See Melancon v. Amoco Production Co., 834 F.2d 1238 (5th Cir. 1988), amended on rehearing, 841 F.2d 572 (5th Cir. 1988). However, the Ruiz court also noted that "no one of these factors, or any combination of them, is decisive, and no fixed test is used to determine the existence" of a borrowed employee relationship. Ruiz, supra at 312. Rather, plaintiff must show that "genuine disputes exist over

enough determinative factual ingredients" to preclude summary judgment. Gaudet v. Exxon Corp., 562 F.2d 351, 358 (5th Cir. 1977), cert. denied, 436 U.S. 913, 98 S.Ct. 2253, 56 L.Ed.2d 414 (1978) (emphasis added); see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254, 106 S.Ct. 2505, 91 L.Ed.2d 202, 215 (1986) ("in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden").

We examine the Ruiz factors in the particular factual context before us. We recognize, too, that the principal inquiry within the Ruiz factors is to determine: (1) whether the second employer was responsible for the working conditions experienced by the employee and the risks inherent therein, and (2) whether the work with the second employer was of such duration that the employee

could be reasonably presumed to have evaluated the risks of the work situation and acquiesced therein. Gaudet, supra at 357. See also, Hebron v. Union Oil Co. of California, 634 F.2d 245, 247 (5th Cir. 1981), and Melancon v. Amoco Production Co., 834 F.2d 1238, 1245 n.12 (5th Cir. 1988), amended on rehearing, 841 F.2d 572 (5th Cir. 1988).

The first Ruiz factor, often considered the most important factor, see Hebron, supra, is: Who has control over the employee and the work he is performing?

Plaintiff argues that Gulf had no control because 95% of the time plaintiff was the operator on the night shift, when there were no Gulf personnel working on the platform. We cannot regard plaintiff as beyond the control of Gulf merely because plaintiff operated the platform at night. Gulf, not Danos & Curole, set

forth plaintiff's nighttime responsibilities. It is immaterial that plaintiff was an experienced operator, who knew how to do the work required of an operator/pumper. In fact, Gulf evaluated plaintiff's work and monitored his competence.*

The second Ruiz factor -- Whose work was being performed? -- illumines the first factor. Plaintiff was performing Gulf's work. Danos & Curole provided workers. Danos & Curole did not own or lease production facilities.

The third factor asks whether an agreement or understanding existed

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*/ We note that the 'control' contemplated in the borrowing employee calculus is not that 'control' sought when imposing the doctrine of respondeat superior. The inquiry here is made for purposes of invoking the tort immunity of the LHWCA, not vicarious liability. See Melancon, supra at 1245; Gaudet, supra at 356.

between the original and the borrowing employer.

Plaintiff points out that the contract between Danos & Curole and Gulf specified that Danos & Curole was an "independent contractor, with the authority to control and direct the performance of the details of the work, Gulf being interested only in the results obtained." Plaintiff's Exhibit A (emphasis added). A contract is determinative of borrowed employee status only if it expressly states that the contractor's employees will not, under any circumstances, be deemed to be employees of the platform company. Alday v. Patterson Truck Line, Inc., 750 F.2d 375, 377-7. Cf. Melancon, supra at 1245.

The contract here does not purport to preclude borrowed employee status. It merely provides Danos & Curole the 'authority' to control. See Hadden v.

Liberty Mutual Ins. Co., No. 86-3638 (5th Cir., Jan. 23, 1987) (unpublished). There is no question here that only Gulf set forth and defined the contours of plaintiff's work assignment and responsibilities. Again, it is immaterial that plaintiff's job - as an experienced operator - did not require close supervision by Gulf's Production Supervisor.

Plaintiff also acquiesced in his new work position, the fourth factor under Ruiz. From the time of his employment with Danos & Curole until the time of his alleged injury, approximately two years, plaintiff worked only on Gulf platforms. Plaintiff complained, at least twice, to the Gulf supervisor in charge about potentially dangerous conditions on Gulf platforms. However, plaintiff never complained to Danos & Curole or otherwise indicated discontent with the work

situation. Indeed, plaintiff was well aware Danos & Curole "just move[d] people around" from work situation to work situation. Plaintiff's Deposition at p. 12.

The fifth factor is whether Danos & Curole terminated its relationship with plaintiff. This factor is not a requirement that the lending employer sever its relationship with the employee. Melancon, supra at 1246.

Plaintiff points out that Danos & Curole required plaintiff to attend and sometimes to conduct weekly safety meetings for Danos & Curole employees. (We note only that the affidavit of Gulf's Senior Production Supervisor says plaintiff was required to attend all Gulf safety meetings). Otherwise, we discern no material restrictions placed on Gulf by Danos & Curole with respect to plaintiff's employment conditions.

The sixth factor asks: Who furnished tools and place for performance?

Danos & Curole provided plaintiff with a uniform and hard hat. Danos & Curole furnished no tools. Gulf provided tools, transportation, quarters and the place for performance.

The remaining three factors also support plaintiff's borrowed status. While employed by Danos & Curole for almost two years, plaintiff was assigned only to Gulf platforms. Gulf had authority to discharge plaintiff from employment on its platforms. It is immaterial that Gulf could not discharge plaintiff from his employment with Danos & Curole. Melancon, supra at 1246.

Finally, although Danos & Curole actually paid plaintiff, plaintiff's pay was based on time tickets approved by Gulf.

We have carefully examined the evidence before us. See Doucet v. Gulf Oil Corp., 783 F.2d 518 (5th Cir.), cert. denied, sub nom. Gulf Oil Corp. v. Danos & Curole Marine Contractors, Inc., 479 U.S. 883, 107 S.Ct. 272, 93 L.Ed.2d 249 (1986). In particular, Danos & Curole provided plaintiff's uniform and required plaintiff to attend safety meetings. And, Gulf provided little training for plaintiff.

However, the bulk of the evidence overwhelmingly indicates plaintiff's borrowed status. Gulf alone was responsible for plaintiff's working conditions and plaintiff was well aware of those conditions.

In sum, we have adduced insufficient facts or factual dispute to negate a borrowed employee relationship in this matter. "Where the record taken as a whole could not lead a rational trier of

fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538, 552 (1986).

Accordingly, defendant, Gulf's Motion for Summary judgment is GRANTED.

DONE AND SIGNED at Alexandria, Louisiana, this 30th day of January, 1989.

Nauman S. Scott
United States District Judge

JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF LOUISIANA

(CAPTION DELETED)

JUDGMENT

That before the Court was a motion for summary judgment filed on behalf of Gulf Oil Corporation, a subsidiary of Chevron, U.S.A., Inc.

This Court, after considering the motion, the documentary evidence, the arguments of counsel, and for the reasons assigned on January 30, 1989, grants the summary judgment filed on behalf of Gulf Oil Corporation.

Accordingly, it is ordered, adjudged and decreed that the plaintiff's suit against Gulf Oil Corporation, a subsidiary of Chevron, U.S.A., Inc., be and it is hereby dismissed with full prejudice to all of plaintiff's rights.

It is further ordered, adjudged and decreed that the third-party complaint of Gulf Oil Corporation against Bell Maintenance is dismissed as being moot.

Thus done and signed at Alexandria, Louisiana, on this 7th day of Feb., 1989.

Nauman S. Scott
Judge

AMENDMENT AND CORRECTION OF JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

(CAPTION DELETED)

AMENDMENT AND CORRECTION OF JUDGMENT

Considering the fact that the dismissal of defendant, GULF OIL CORPORATION renders the intervention of intervenor, UNITED STATES FIRE INSURANCE COMPANY moot so that the intervention should be dismissed as a matter of law and the judgment of February 7, 1989 is therefore complete, it is

ORDERED that our judgment of February 7, 1989 be amended and corrected so as to add the following paragraph:

> "FURTHER ORDERED, ADJUDGED AND DECREED that the intervention of UNITED STATES FIRE INSURANCE COMPANY be and is hereby dismissed."

DONE AND SIGNED in Alexandria, Louisiana on this the 29th day of March, 1989.

NAUMAN S. SCOTT
U.S. DISTRICT COURT JUDGE

OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE
FIFTH CIRCUIT

(CAPTION DELETED)

Appeals from the United
States District Court for the
Western District of Louisiana
(CV-86-0016-O)

(December 26, 1989)

Before THORNBERRY, POLITZ, and JOLLY, Circuit Judges. PER CURIAM:*

Winston J. Perron and the United States Fire Insurance Company appeal an adverse summary judgment in favor of Gulf Oil Corporation. The district court found that Perron was precluded from recovering for injuries suffered in an

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

accident on a Gulf platform because he was Gulf's "borrowed servant." Finding no error, we affirm.

Background

At the time of his injury Perron was an employee of Danos & Curole Marine Contractors, Inc. (D&C). D&C had a contract to furnish labor, equipment, and boats to Gulf for its offshore operations. Pursuant to this contract, Perron was assigned to work on a Gulf platform off the Louisiana coast. As a skilled pumper/lease operator, Perron was responsible for ensuring continued production on the Gulf platform.

Perron remained on the payroll of D&C but his work was directed by Gulf which determined his work situs, hours, and scope of duties. Gulf reserved the right to discharge any D&C employee from its platforms and a Gulf supervisor had

to approve Perron's time records. Until a few days before his accident, Perron spent 95% of his time as supervisor on the night shift on Gulf's "I" platform. The last few days were spent on Gulf's platform "A" where the accident occurred.

Perron's suit against Gulf invokes the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 et seq. United States Fire Insurance Company, as the compensation carrier for D&C, was allowed to intervene to recover for the workmen's compensation benefits it had paid to Perron. Gulf's motion for summary judgment was based on the proposition that as a borrowed servant Perron's exclusive remedy for his injuries was his compensation claim under the Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 905(a).

Analysis

Whether a worker is a borrowed servant for purposes of compensation coverage, and the employer's concomitant tort immunity, is determined by application of a nine-part inquiry we first enunciated in Ruiz v. Shell Oil Co., 413 F.2d 310 (5th Cir. 1969):

1. Who controls the employee and his work, beyond mere suggestion of details or cooperation?

2. Whose work is being performed?

3. Was there an agreement, understanding, or meeting of the minds between the original and borrowing employer?

4. Did the employee acquiesce in the new work situation?

5. Did the original employer terminate its relationship with the employee?

6. Who furnished the tools and place for performance?

7. Was the employment over a considerable length of time?

8. Who had the right to discharge the employee?

9. Who had the obligation to pay the employee?

413 F.2d at 312-13. Although premised on factual determinations, whether a borrowed employee relationship exists is a question of law, Melancon v. Amoco Production Co., 834 F.2d 1238 (5th Cir.), amended on reh'g, 841 F.2d 572 (1988), recognizing that summary judgment can be an appropriate means of resolving the question. Alday v. Patterson Truck Line, Inc., 750 F.2d 375 (5th Cir. 1985); Gaudet v. Exxon Corp., 562 F.2d 351 (5th Cir. 1977), cert. denied, 436 U.S. 913, 98 S.Ct. 2253, 56 L.Ed.2d 414 (1978).

Perron contends that the district court erroneously relied on the fourth, fifth, sixth, and seventh Ruiz factors, to the exclusion of the others, in

concluding that he was Gulf's borrowed employee. Perron emphasizes the district court's statement that

> the principal inquiry within the Ruiz factors is to determine: (1) whether the second employer was responsible for the working conditions experienced by the employee and the risks inherent therein, and (2) whether the work with the second employer was of such duration that the employee could be reasonably presumed to have evaluated the risks of the work situation and acquiesced therein.

Perron argues that a sufficient number of Ruiz factors were disputed, thus making summary judgment inappropriate.

Our de novo review of the entire record leads us to the conclusion that appellants' contentions overly emphasize semantics. After making the above-quoted statement, the district court analyzed each of the nine Ruiz factors and found that "the evidence overwhelmingly indicates [Perron's]

borrowed status." Independently applying these factors, we find insufficient genuine factual dispute on any material issue sufficient to preclude summary judgment. The summary judgment evidence clearly establishes that Gulf controlled the nature and scope of Perron's responsibilities and the conditions under which he worked.

AFFIRMED.

DENIAL OF PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING
EN BANC TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

(CAPTION DELETED)

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion 12/26/89), 5 Cir., 198__, _____

F.2d _____)

(February 5, 1990)

Before THORNBERRY, POLITZ and JOLLY,

Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the

reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

Henry A. Politz
United States Circuit Judge

APPENDIX B

representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title."